



**Republic v County Government of Kisumu & another; Aminakash Co Ltd (Exparte Applicant)
(Judicial Review E002 of 2022) [2023] KEHC 26121 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW E002 OF 2022
RE ABURILI, J
NOVEMBER 28, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

**CHIEF OFFICER, AGRICULTURE & IRRIGATION COUNTY GOVERNMENT
OF KISUMU 2ND RESPONDENT**

AND

AMINAKASH CO LTD EXPARTE APPLICANT

JUDGMENT

1. The ex parte applicant Aminakash Co. Ltd filed the notice of motion application dated 28th January 2022 and filed on the 2nd February 2022 brought under Sections 1A and 3A of the [Civil Procedure Act](#), Sections 4, 7, 8, 9 and 11 of the [Fair Administrative Action Act](#) 2015, Sections 8,9 and 10 of the [Law Reform Act](#) and Order 53 Rule 1 & 2 of the Civil Procedure Rules seeking orders:
 - i. That this Honourable court be pleased to grant the Ex-Parte applicant herein an order of certiorari to remove into this court and quash the decision of the 1st and 2nd respondents vide a letter dated 1st September 2021 to purportedly terminate the contract for the Proposed Construction of Irrigation Structures in Gem Rae Scheme in Nyakach sub-county between the parties executed on the 10th March 2020.
 - ii. That this Honourable court be pleased to grant the Ex-Parte applicant herein an order of prohibition to remove into this court and prohibit the 1st and 2nd respondents from purportedly terminating the contract for the Proposed Construction of Irrigation Structures



in Gem Rae Scheme in Nyakach sub county between the parties executed on the 10th March 2020.

- iii. That costs of this application be provided for.
2. The motion is supported by the facts and grounds contained in the Statutory statement and the supporting affidavit of Michael Kasha Mwavula sworn on the 28th January 2022.
3. It was the applicant's case that they duly bid for advertised works to be undertaken in the County of Kisumu and vide a letter dated 21st February 2020, they were declared successful bidders at a consideration of Kshs. 32,926,204 and that subsequently, the exparte applicant duly acknowledged and accepted the said offer vide a letter dated 24th February 2020.
4. The exparte applicant averred that on or about the 10th March 2020, it executed the said contractual documents with the 1st respondent and that it immediately moved into the site and commenced works in accordance with the parameters of the project and in strict compliance with the express provisions of the contractual agreement.
5. It was the applicant's case that vide a letter dated 1st September 2021 received on the 6th December 2021, the 2nd respondent purported to terminate the contract between the parties on the allegations that the exparte applicant had abandoned the site and delayed completion of the said works, without the 2nd respondent appreciating that the works carried out stood at 97% completion and that there were pending payments for works done, due and owing to the exparte applicant.
6. The exparte applicant asserted that the purported termination of the contract by the respondents was bound to prejudice the exparte applicant and expose it to immense loss and damages and as the 1st respondent is an arm of government and the 2nd respondent a state officer, their actions are subject to review and/or supervision by this court.
7. The exparte applicant further avers that in a show of contempt, the respondents have gone ahead and instructed a third party to take over the site and continue the works from where the exparte applicant left.
8. Opposing the Notice of Motion, the 2nd respondent filed a replying affidavit sworn on the 9th June 2022 by Paul Omanga in which he deposed that the contract between the Respondents and the exparte applicant was for a period of 180 days and further that the contract sum was Kshs. 32,926,204 and that the contractor commenced work on the 27th June 2020 and raised two certificates that were assessed and paid.
9. It was deposed for the 2nd respondent that upon payment of the two certificates, the exparte applicant breached the express terms of the contract by failing to complete the project within the stipulated time of 180 days and upon grant of an extension, the exparte applicant was still unable to complete the works within the extension period; that the exparte applicant subsequently abandoned the site for a period of more than one year and that the exparte applicant admitted to having financial challenges as the reason for abandoning the site.
10. Further deposition for the 2nd respondent was that they wrote to the exparte applicant's bank to liquidate their performance bond in line with the contract but the same could not materialise due to reasons unknown to the respondents.
11. It was further deposed that the respondents followed due process and subsequently terminated the contract and that there were no pending payments to the exparte applicant as at the time of termination of the said contract contrary to the allegations by the exparte applicant.



12. It was further deposed that the orders sought by the ex parte applicant had since been overtaken by effluxion of time and events since the contract was awarded to another contractor, to complete the remaining works.
13. The parties canvassed the application by way of written submissions.

The Ex parte Applicant's Submissions

14. The ex parte applicant's counsel submitted that the actions taken by the 1st respondent to investigate the ex parte applicant were without cause, was illegal, irrational and procedurally improper and thus there were valid grounds for seeking for and grant of the orders of judicial review as was held in the case of *Pastoli v Kabale District Local Government Council & Others* [2008] 2 EA 300.
15. It was submitted that the impugned action was an administrative action within the meaning of the *Fair Administrative Action Act* as it affected the rights and interest of the ex parte applicant. The ex parte applicant further submitted that whereas the respondents enjoyed discretionary power, the said power should be exercised in a reasonable manner especially considering that the works carried out at the site stood at 97% completion. Reliance was placed on the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223.
16. The ex parte applicant submitted that the respondents had not demonstrated any reasonable grounds for terminating the contract. The Reliance was placed on the case of *R v Public Procurement Administrative Review Board & 2 Others Ex-Parte Rongo University* [2018] eKLR.
17. It was submitted that the respondents acted against the rules of natural justice and with procedural impropriety in purportedly terminating its contract and as such, no due process was followed. Reliance was placed on the case of *Republic v Kenya Airports Authority Ex-Parte Seo & Sons Limited* [2018] eKLR.
18. The ex parte applicant further relied on the cases of *R v Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007* and that of *Ridge v Baldwin* [1963] 2 All ER 66 AT 81 where it was held inter alia that a decision given without the principles of natural justice is void.

The Respondents' Submissions

19. It was submitted on behalf of the respondents that the ex parte applicant's right to fair administrative action was not violated because, upon finding no remedy from the ex parte applicant for its breach of contract, the respondents legally and procedurally terminated the contract between the parties and communicated the termination to the ex parte applicant and subsequently, the respondents had no option but to undertake public procurement process for the remainder of the project.
20. It was further submitted that the reliefs sought by the ex parte applicant were unwarranted and baseless and an affront to justice given that the ex parte applicant was given many chances to make good its own material breach of the contract and thus the instant suit ought to be dismissed with costs.

Analysis & Determination

21. I have carefully considered the pleadings filed by the parties herein, the affidavits and annexures thereto as well as the submissions and authorities relied on by both parties and find that the main issue for determination is whether the Ex Parte Applicant is entitled to the Judicial Review Orders sought.
22. The ex parte Applicant has sought for orders of Certiorari to quash the decision of the Respondents to terminate the contract and award the remainder of the works to a different contractor when the



remainder thereof was only 3%. It claims that the said decision was made in violation of the exparte applicant's right to be heard and against the rules of natural justice. The exparte applicant further seeks for an order of prohibition, prohibiting the respondents from terminating the contract between the exparte applicant and the respondent.

23. The scope of the remedies of certiorari and prohibition were considered in Republic v Kenya National Examinations Council ex parte Geoffrey Gathenji and 9 Others Civil Appeal No. 266 of 1996 where the Court of Appeal held that:

“The remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment. The nature and scope of certiorari was discussed in the case of Captain Geoffrey Kujoga Murungi Vs Attorney General Misc Civil Application No. 293 of 1993 where it was stated; “Certiorari deals with decisions already made ...Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice...”

24. It must be remembered that judicial review is concerned not with private rights or purely the merits of the decision being challenged but with the decision making process. The purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R v Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

25. From the foregoing, the question is whether this matter is properly before me as a judicial review court or whether it belongs to the realm of ordinary civil courts. To determine this issue, I must first deal with the distinction between public law and private law, a distinction which is not always easy to make. In Peter Okech Kadamas v Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194, Hancox, JA expressed himself as follows:

“The order of judicial review is only available where an issue of “public law” is involved but the expressions “public law” and “private law” are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies. On the other hand to concentrate upon remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of certiorari might well be available if the health authority is in breach of a “public law” obligation but would not be if it is only in breach of a “private law” obligation.”

26. On his part Platt, JA expressed himself as follows in the same case:

“It would, as a general rule, be contrary to public policy and as such an abuse of the process of the Court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was of an ordinary action, and by this means to evade the provisions of Order 53 for the protection of such authorities.....By an extension of remedies and a flexible procedure it can be said that something resembling a system of public law is being developed. Before the expression “public law” can be used to deny a subject a right of action in a positive prescription of law by statute or by statutory rules.....If a matter of



public law is directly involved then in general (subject to certain exceptions) the prerogative orders should be resorted to since the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decisions.....But if the matter is truly a private matter, then a civil suit would be appropriate.....At present it is not entirely easy to decide what is a private law matter as distinct from a public law matter.....Employment by a public authority per se does not inject any element of public law. Nor does the fact that the employee is in a higher grade or is an officer as distinct from the holder of an office; this only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning of his employment. A reinstatement made under the Trade Disputes Act is a “private law” matter and a breach of such an order would not give rise to a “public law” remedy. A new cause of action created by a statute and consequent remedies for employees who have been “unfairly” dismissed is by no means simultaneously wrongful dismissal under common law. This new cause of action, however and statutory remedies that go with it, are not enforceable by ordinary action, nor indeed by judicial review; they are only available to an employee on a successful application to an industrial tribunal.”

27. Where, therefore, the dispute is a purely private dispute, to invoke the jurisdiction of a Court in exercise of its judicial review powers would be undesirable.
28. A contract creates rights and obligations and parties to it are therein bound by those terms and conditions. In this case, the relationship between the exparte applicant and the respondents was contractual so that the exparte applicant’s remedy lay in a claim for damages for breach of contract if at all there was such breach, and not in judicial review. Further, judicial review is not applicable where there is an alternative remedy. In addition, where granting the order of prohibition would be in vain as the remainder of the contractual works had already been performed by a third party, it would be useless to grant such an order prohibiting the respondents from terminating the contract which had already, in any case, been terminated, and there is no contrary view.
29. Having considered all the affidavits, the submissions and all the authorities cited I find that the exparte applicant has failed to establish the requisite grounds available in judicial review. As I have already stated, the relationship that existed between the exparte applicant and the respondents was contractual. If there was a breach of contract, the exparte applicant would be entitled to a claim in a Civil Court.
30. Therefore, whereas the exparte applicant’s grievance may be sound in an ordinary civil claim, its claim for judicial review remedies is, in my humble view, misplaced.
31. It therefore follows that judicial review procedure was neither the most efficacious method for the exparte applicant to ventilate its grievances nor are the remedies under judicial review available to the exparte applicant in the circumstances of this case. For that reason, and in order not to prejudice any action which may be commenced by the exparte applicant in the civil court, I decline to make any specific findings on the issues which may form the subject of the said proceedings were they to be instituted.
32. In the result I find that the exparte applicant’s claim is not tenable as the same is incompetent having been brought by way of judicial review in a clear case of an alleged breach of contract.
33. I dismiss the Notice of motion dated 28th January, 2022 with an order that each party bear their own costs.
34. This file is closed.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF NOVEMBER, 2023

R.E. ABURILI

JUDGE

